On May 2, 1960, Amerada filed a petition for rehearing of the Commission's order of April 5, 1960 (R. 883), which was denied by the Commission on May 27, 1960. (R. 901). A petition for review of this order was filed in the Court of Appeals on July 25, 1960.

In order to minimize its possible loss, Amerada, on April 25, 1960, refiled the notices of rate change rejected by the Commission's order of April 5, 1960. (R. 96, 215, 298, 357, 437, 514, 572, 616, 662). In so doing, Amerada expressly reserved its right to attack the validity of that order and urged that the increased rates be allowed to become effective on June 1, 1960, five months after the effective date specified by the renegotiated contracts. Ignoring Amerada's request, the Commission, in a perfunctory order issued May 25, 1960, suspended the increased rate embodied in Amerada's refiled supplemental rate schedules until November 1, 1960, ten months after the effective date specified by contract (R. 906). Amerada challenged the validity of this order in Cause No. 6498 in the Court of Appeals. The petition for rehearing of this order, filed by Amerada on June 24, 1960, was denied by the Commission on July 21, 1960 (R. 912, 935). The petition for review of this order was filed in the Court of Appeals on August 11, 1960.

Upon review of the Commission's orders of April 5, 1960, and May 25, 1960, the Court of Appeals for the Tenth Circuit in an opinion by Judge Bratton, Judges Lewis and Breitenstein concurring, affirmed both orders. Rehearing was denied without further opinion.

REASONS WHY THE WRIT SHOULD ISSUE

The question presented by this petition is of great importance to the proper administration of the Natural Gas Act and is one that has not been previously decided by this Court. The Federal Power Commission, an administrative body possessing only those powers conferred by statute, has ignored the basic system of regulation established by the Natural Gas Act and has overstepped the bounds of its delegated authority by imposing substantive restrictions upon the rate-changing power of regulated natural gas companies not contained in or contemplated by the Natural Gas Act.

If the decision of the Court of Appeals affirming this flagrant assertion of undelegated power by the Commission is not reviewed and reversed by this Court, the freedom and flexibility built into the Natural Gas Act by Congress to enable natural gas companies to provide by individualized contractual arrangements for the revenues which prudent operation of their enterprises requires will be seriously and needlessly impaired. Under the authority asserted by the Commission in this case, a natural gas company may be arbitrarily deprived of contractually authorized rate increases absolutely necessary to recover its costs merely because the operation of prior rate increases is then suspended. The question here presented is, therefore, of great significance and should be decided by this Court.

Further, as will be shown hereafter, the decision of the Court of Appeals for the Tenth Circuit on this important issue is squarely in conflict with the decision of the Court of Appeals

for the District of Columbia in *Willmut Gas & Oil Company v. Federal Power Commission*, 294 F. 2d 245, issued July 20, 1961, just four days prior to the decision of the Court of Appeals in the case at bar (Appendix B). The unsuccessful party in the *Willmut* case, Willmut Gas and Oil Company, has previously filed a petition for certiorari in this Court, relying in part upon the conflict which exists between the decision in that case and the decision in the case at bar. Willmut's petition, designated Case No. 506, has not been acted upon by this Court.

In both *Willmut* and in the case at bar, it was argued that the Commission has authority to restrict in a manner not specified by the Act the power which natural gas companies have to change their rates. In *Willmut*, the restriction urged would bar notices of further increases while the lawfulness of prior increases is under investigation. In the instant case, the asserted restriction would bar notices of further increases while prior increases are suspended incident to an investigation of their lawfulness. In both cases, the restriction urged would summarily deprive natural gas companies of contractually authorized rate increases without a determination that such increases are unlawful. The *fundamental issue* in both cases is therefore the same. In *Willmut*, the Court of Appeals for the District of Columbia correctly refused to uphold the unauthorized restriction asserted. In the case at bar, the restriction imposed by the Commission was affirmed by the Court of Appeals for the Tenth Circuit. In order to reconcile this conflict between circuits on this important question,

it is urgent that certiorari be granted by this Honorable Court.

This Court has had occasion previously to analyze in detail rate-making and rate-changing procedures under the Natural Gas Act. *United Gas Pipe Line Company v. Memphis Light Gas and Water Division*[2], 358 U.S. 103 (1958); *United Gas Pipe Line Company v. Mobile Gas Service Company*[3], 350 U. S. 332 (1956). The Court is respectfully urged to refresh its recollection of those cases and to read once again those opinions in connection with this petition for certiorari. In those cases, this Court made it plain that the function of the Commission is not to *fix* rates, but is to *review* the lawfulness of rates which are established in the first instance by regulated natural gas companies. The Act is, therefore, not the *source* of the authority of natural gas companies to make and change rates, but merely specifies those *procedural* limitations upon the power to make and change rates possessed by natural gas companies in the absence of the Act which are necessary to effectuate the Commission's basic power of review. *Mobile.* Manifesting Congressional concern for "the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake," Section 4 of the Act provides for "the earliest effectuation of contractually authorized . . . rate changes consistent with appropriate Commission review." *Memphis.* In short, as this Court stated in *Mobile*, "except as *specifically* limited by the Act, the ratemaking powers of natural gas companies were to be no different than those they would possess in the absence of the Act."

---

[2]Cited hereafter as "*Memphis*".
[3]Cited hereafter as "*Mobile*".

Pointing out that a regulated natural gas company "has the right in the first instance to change its rates *as it will*, unless it has undertaken by contract not to do so," this Court, in *Memphis*, spelled out the restrictions which the Act imposes upon rate changes:

> "The Act comes into play *only* in (1) imposing upon the seller the procedural requirement of filing timely notice of change, (2) giving the Commission authority to review such changes, and (3) authorizing the Commission . . . to suspend the new rates for a five month period and thereafter to require the posting of a refund bond pending a determination of the lawfulness of the rates as changed." (Emphasis added.) 358 U. S. 113.

It is, thus, quite clear that the *only* restrictions upon rate changed under the Act are those *specified* in Sections 4(d) and 4(e) of the Act.

In rejecting notices of rate changes during periods of suspension of prior rate changes relating to the same sale, the Commission relied upon no *specific* restriction in the Act. Nor was the Court of Appeals in affirming the Commission's orders, able to point to any provision of the Act *specifically* imposing the restriction which the Commission has attempted to enforce. In affirming the orders of the Federal Power Commission challenged by Amerada, the Court of Appeals held that natural gas companies are "restricted by express or *implied* provisions in the Act" and purported to find in Section 4(d) of the Act an *implied restriction* supporting the action of the Commission. In Section 16 of the Act, the court found a Congressional grant to the Commission of broad and sweeping powers which the court construed as authorizing the

Commission's action in these cases. The Court of Appeals also based its decision upon administrative interpretation of the Act by the Commission.[4]

In finding an *implied* restriction upon rate changes in the Act, the Court of Appeals ignored the teaching of this Court in *Memphis* and *Mobile* that the *only* restrictions upon the power of natural gas companies to change rates are those *specified* in the Act. From the rationale of *Memphis* and *Mobile*, it necessarily follows that the Act contains *no implied restrictions upon rate changes*. This Court has made it quite clear in a recent decision that the authority of an administrative body specified by statute "should not be modified by resort to such generalities as 'administrative and flexibility' and 'implied powers' " and that administrative bodies may not "rely on their own notions of implied powers in the enabling act " *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U. S. 316 (1961).

Further, the restrictions *specified* in the Act are all that are necessary for the Commission to discharge its basic statutory function of rate *review*. Rejection of rate changes when prior changes relating to the same sales are suspended is in no way necessary to the proper review by the Commission of the lawfulness of rate changes. *Each rate change* must be preceded by thirty days' notice to the Commission and may be suspended for five months pending a hearing concerning its lawfulness. *Each rate change* involving an increased rate is subject to the Commission's power to require a refund of any portion thereof found not justified. No reason was offered by

[4]The Court of Appeals cited Sections 2.4(f) and 2.52 of the Commission's Regulations set out in Appendix D hereto.

the Commission for the restriction it imposed; no relationship to its statutory function was suggested. Nor did the Court of Appeals in finding implied authority in the Act for such a restriction point to any such reason or relationship.

There is, therefore, absolutely no basis in law for *implying* authority in the Federal Power Commission to apply restrictions which do not have, and which are not even represented to have, any reasonable relationship to the powers, duties and functions specifically conferred upon it by the Natural Gas Act. If authority is to be given the Commission by implication, it can only be that authority which is "*reasonably necessary*" and "*fairly appropriate*" to effect its specified powers and functions. See, *e. g., Colorado Interstate Gas Company v. Federal Power Commission*, 142 F. 2d 943 (10th Cir. 1944), aff'd. 324 U.S. 581. It is made clear in *Mobile* that the Act only "imposes such duties on natural gas companies *as are necessary to effectuate*" the Commission's basic review powers. The restriction which the Commission has imposed on making rate changes has *no relationship* to its basic power of review and is, thus, wholly arbitrary. It is the function of the Federal Power Commission to review the lawfulness of Amerada's rates, not to arbitrarily deprive Amerada of revenues for reasons having no relationship to that function.

Without being very specific as to the language it was relying on, the Court of Appeals found in Section 4(d) of the Act "a clear token of Congressional implication" supporting the restriction of rate changes which the Commission

has attempted to enforce in the cases at bar. Section 4(d) of the Act is set out in full in Appendix D hereto. This Honorable Court is urged to give this section of the Act, as well as Sections 4(c) and 4(e), immediately preceding and following Section 4(d), close scrutiny. A careful reading will make it clear that Section 4(d) provides no support for an implied restriction on rate changes, assuming, *arguendo*, that implication of such restrictions were proper under the Act.

Section 4(c) requires that natural gas companies file with the Commission schedules showing all rates and charges for any sale subject to the jurisdiction of the Commission. Section 4(d) provides that, unless the Commission otherwise orders, no change shall be made in "any such rate" except after thirty days notice to the Commission and to the public. This Court made it plain in *Mobile* that the phrase "any such rate" means any rate on file with the Commission pursuant to Section 4(c). Having expressly imposed a thirty-day notice requirement upon the making of rate changes, Section 4(d) specifies *how* that notice shall be given, *viz.* by filing with the Commission "new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect."

The Commission and, apparently, the Court of Appeals rely heavily upon the phrase "schedules then in force" to show an implied restriction upon rate changes during a period when prior rate changes are suspended. However, as this Court will note, the only possible meaning which an ordinary, logical

reading of Section 4(d) permits to be given the phrase "schedules then in force" is rate schedules on file with the Commission pursuant to the requirement of Section 4(c). It is neither reasonable or necessary to give this portion of the Act any other meaning. This reading of Section 4(d) is in accord with the scheme of regulation established by the Act. No reason for torturing the clear language of this part of the Act is suggested by the Commission or by the Court of Appeals. There is, therefore, no basis for this Court to give Section 4(d) anything but its plain meaning. See, *Border Pipe Line Co. v. Federal Power Commission*, 171 F. 2d 149 (D.C. Cir. 1948). Thus, under the Act (1) natural gas companies are subject only to the *specific* restrictions which Section 4 imposes upon their rate-changing powers, (2) there is no reason, and, hence, no basis in law for *implying* a restriction in Section 4(d) of the Act upon making rate changes when prior changes are suspended and (3) the language of Section 4, given its natural meaning, does not support the implication of such a restriction.

In direct conflict with the holding of the Court of Appeals below, the Court of Appeals for the District of Columbia in *Willmut*, decided just four days earlier, correctly construed the rate-changing procedures of the Act in accordance with the teaching of this Court in *Mobile*, and *Memphis* and refused to read into the Act restrictions on rate changes not specified therein. Noting that the "rate-making and rate-changing power" of natural gas companies "is not affected by the Natural Gas Act," the court in *Willmut*, in an opinion written by Chief Judge Wilbur K. Miller, Judges Fahy and Burger concurring, said:

> "Section 4(d) of the Act does not give the Commission discretion to *reject* schedules of increased rates tendered by a natural gas company; on the contrary, Section 4(d) *requires* that new schedules be filed with the Commission when notice of a rate change is given. The Commission's power with respect to a filed increase is found in Section 4(e): to initiate a hearing as to the lawfulness of the changed rates, to suspend their effectiveness for a time, and to order refunded that portion of the increase which, after hearing, it determines to be unlawful. Thus the Act provides for investigation of changed rates which have been filed; *but it does not contemplate that the Commission may refuse to file a tendered new schedule showing changes in rates, or that it may summarily reject or disallow the new schedule without a hearing.*" (Emphasis added.) 294 F. 2d 248-249

It was argued in *Willmut* that the filing of successive rate increases while prior increases were still under investigation caused the Commission to lose jurisdiction of the prior increases and required that such increases be refunded. The court, however, found no authority in the Act for such a proposition and refused to resort to implication:

> "We find nothing in the Act or in the decisions which authorizes the Commission to disclaim further jurisdiction in a pending Section 4(e) hearing because another rate increase was filed during its pendency. *And we are unwilling to hold, in the absence of controlling judicial precedent or express statutory provision requiring us to do so, that increased rates which are the subject of unfinished hearings under Section 4(e) must or may be summarily disallowed because the natural gas company files a schedule of new increases.*"
> (Emphasis added.) 294 F 2d 249.

The decision in *Willmut* is in harmony with the decisions of this Honorable Court in *Memphis* and *Mobile*; it is squarely contrary to the decision of the court below in the case at bar. *Willmut* finds further support in *Mississippi River Fuel Corporation v. Federal Power Commission*, 202 F. 2d 899 (3rd Cir. 1953). In that case, the court noted the limits on the power of the Commission upon the filing by a natural gas company of a changed rate:

> "On the face of Section 4 of the Natural Gas Act, . . . it is clear that, Mississippi's proposed tariff changes having been duly filed, *the Commission had only two alternatives.* By failing to act it could have allowed them to become effective, or, it could have entered upon a hearing and, pending such hearing, could have suspended the proposed new schedules for a period not exceeding five months beyond the proposed effective date. It did neither of these things. *It purported to follow a third course, rejection without a hearing — a course for which it cannot show even color of statutory authority.*" (Emphasis added.) 202 F. 2d 902.

The reliance by the Court of Appeals in the case at bar upon Section 16 of the Act to support the restriction imposed by the Commission is also clearly erroneous and is in diametric conflict with the holding in *Willmut* on this point. Section 16 gives the Commission broad *administrative* powers. Thus, the Commission may "perform any and all acts, . . . prescribe, issue, make, amend, and rescind such orders, rules and regulations as it may find *necessary* or *appropriate to carry out the provisions of this Act.*" (Emphasis added.) Manifestly, this is not an *unlimited* grant of power. Action taken pursuant to Section 16 may not be arbitrary, but must have

some *reasonable relationship* to the Commission's basic authority under the Act. See, *e.g., Manhattan General Equipment Company v. Commissioner of Internal Revenue*, 297 U. S. 129, 134-135 (1936); *Review Committee v. Willey*, 275 F. 2d 264, 272 (8th Cir. 1960), cert. denied 363 U. S. 827. And "a regulation or ruling which creates a rule out of harmony with the statute is a nullity." *Manhattan General Equipment Company v. Commissioner of Internal Revenue, supra*; *U. S. v. Eddy Brothers, Inc.*, 291 F. 2d 529, 531 (8th Cir. 1961). Here, as shown above, the restriction imposed is not in harmony with the Act, has *no relationship* to the basic authority of the Commission and is wholly arbitrary.

It was obviously the purpose of Congress in enacting Section 16 to allow the Commission to prescribe *forms* and *procedures* "necessary or appropriate" to implement its specified statutory functions. See, *Atlantic Seaboard Corporation v. Federal Power Commission*, 201 F. 2d 568 (4th Cir. 1953); *Mississippi River Fuel Corporation v. Federal Power Commission, supra*. Section 16 is not, however, and could not validly be a delegation to the Commission of unfettered legislative power. It furnishes no authority for imposing a *substantive* restriction on rate changes not specifically authorized by the Act. See, *Mississippi River Fuel Corporation v. Federal Power Commission, supra*.

In *Willmut*, the court correctly *restricted* the scope of Section 16 of the Act. Noting that this part of the Act "speaks in broad and general terms," the court said:

"But *the broad power granted by this statutory*

language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the requirement of Section 4(d) *of the Act that it notify the Commission of the changes,* so that it may proceed under Section 4(e).

* * *

"An order or regulation requiring the rejection of increased rates because earlier increases were still under investigation . . . would deny to (the company) the right to change rates at which it offers service, *which the Mobile decision says is the right of a natural gas company.* Thus, it seems clear that *such an order or regulation would amount to a legislative change which is beyond the authority of the Commission.*" (Emphasis added.) 294 F. 2d 250.

The Court of Appeals was also mistaken in relying upon administrative interpretation to support the Commission's action in these cases. It is an elementary legal axiom that an administrative body cannot by administrative interpretation or otherwise enlarge its own statutory authority. *E.g., Social Security Board v. Nierotko,* 327 U. S. 358, 369 (1946); *Signal Oil and Gas Company v. Federal Power Commission,* 238 F. 2d 771, 774 (3rd Cir. 1956). But this is precisely what the Commission has attempted to do in rejecting notices of rate changes during a period when prior rate changes relating to the same sale are suspended. It is plain that the Act imposes *no* restrictions upon the making of rate changes other than those *specified* and that the restriction which the Commission would impose is *not specified.* The Commission's

interpretation to the contrary, no matter how long-standing, is erroneous and cannot override the clear language of the Act. As this Court has succinctly observed, "even consistent error is still error." *Phillips Petroleum Corporation v. State of Wisconsin*, 347 U. S. 672, 678, n. 5 (1954).

CONCLUSION

In summary, the opinion of the Court of Appeals for the Tenth Circuit erroneously decided a question of great importance to the proper administration of the Natural Gas Act. The decision is squarely in conflict with the decision of the Court of Appeals for the District of Columbia in the *Willmut* case and is in conflict with the rationale of this Court in *Memphis* and *Mobile*. For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT E. MAY
1700 K Street, N. W.
Washington 6, D. C.
Attorney for
Amerada Petroleum Corporation

Of Counsel:

ROBERT J. STANTON
JOSEPH W. MORRIS
JOHN S. MILLER
N. KENNETH SCOTT, JR.
P. O. Box 2040
Tulsa, Oklahoma